that may be reviewed at the conclusion of the criminal proceedings. See Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 258 n.59 (8th ed. 2002). The practice of deferring review until final judgment promotes judicial efficiency by ensuring that, if the defendant's conviction and sentence ultimately are affirmed on appeal, all of the defendant's claims—or at least those that the defendant concludes are most meritorious—will be consolidated and presented in a single petition to this Court. See *ibid.*

2. Petitioner contends (Pet. 11-24) that the district court erred in instructing the jury on the intent required for conviction under 21 U.S.C. 841(c)(2). He argues that the instruction approved by the court of appeals removes any *mens rea* requirement in Section 841(c)(2) prosecutions, and he contends that the Constitution in most cases prohibits conviction for a criminal offense without a showing of *mens rea*. The court of appeals correctly rejected petitioner's argument that the challenged instruction eliminates any *mens rea* element, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

a. Section 841(c)(2) punishes persons who knowingly or intentionally possess or distribute a listed chemical, such as pseudoephedrine, "knowing, or having reasonable cause to believe," that the listed chemical will be used to unlawfully manufacture a controlled substance. 21 U.S.C. 841(c)(2). The jury instruction at petitioner's trial defined having "reasonable cause to believe" as "to have knowledge of facts which, although not amounting to direct knowledge, would cause a reasonable person knowing the same facts, to reasonably conclude that the

pseudoephedrine would be used to manufacture a controlled substance." Pet. App. 7.

Contrary to petitioner's argument, the instruction describing the meaning of "reasonable cause to believe" does not eliminate the criminal intent requirement from the statute. Rather, the challenged instruction describes an intent requirement that, as the court of appeals observed, "incorporates both subjective and objective considerations to ensure the defendant had a sufficiently 'guilty mind' in violating the statute." Pet. App. 2-3, 7. The district court's instruction did not permit a conviction for mere negligence in ascertaining the facts. See *United States* v. *Green*, 779 F.2d 1313, 1318 (7th Cir. 1985) ("reasonable cause to believe" provision in the statute "does not criminalize a negligent or reckless act"). Rather, in accord with the language of Section 841(c)(2), the instruction required the government to prove that petitioner subjectively knew facts that either caused him or would cause a reasonable person to believe that the ingredients are being used to produce illegal drugs. As the court below correctly noted, that "standard [of proof] limits the likelihood that a defendant will be prosecuted for mere inadvertent conduct and is consistent with the longstanding principle presuming a mens rea requirement for criminal activity." Pet. App. 7.

b. Because the instructions at petitioner's trial did not eliminate the criminal intent required for conviction under Section 841(c)(2), petitioner's reliance on decisions of this Court that have either imputed a knowledge requirement where a statute was silent as to the requi-

site intent,[3] or construed ambiguous language in a statute to apply a knowledge requirement to particular elements of an offense,[4] do not apply. Here, the court of appeals concluded that there is no need to read a mental state requirement into Section 841(c)(2) because "it already limits criminal punishment to those who acted 'knowing or having reasonable cause to believe' that illegal activity was afoot." Pet. App. 7-8 n.1. Moreover, petitioner's opposing view, which would require the government to prove that the defendant had actual subjective knowledge that the chemical was to be used to unlawfully manufacture controlled substances fails to take into account the "reasonable cause to believe" language in the statute. See *id.* at 8 ("Such a reading would be redundant because the statute already provides for conviction based on a defendant's actual knowledge of the intended illegal use."); see also *United States* v. *Kaur*, 382 F.3d 1155, 1157 (9th Cir. 2004) ("[T]he statute clearly presents knowledge and reasonable cause to believe as two distinct alternatives; reasonable cause to believe would be superfluous if it meant knowledge.").

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[3] For example, petitioner cites (Pet. 24) *Staples* v. *United States*, 511 U.S. 600, 605 (1994), where the Court read a criminal intent requirement into a firearms statute that was otherwise silent on the required *mens rea*. Unlike the firearms statute in *Staples*, the text of Section 841(c)(2) specifies the intent requirement—*i.e.*, that the defendant know, or have reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance.

[4] Petitioner cites (Pet. 21-23) *Liparota* v. *United States*, 471 U.S. 419 (1971) and *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994). The statutes in those cases included the term "knowingly," and the cited decisions addressed whether that intent requirement applied to certain offense elements. That type of interpretive question is not presented by the language of Section 841(c)(2).

d. Petitioner contends (Pet. 11-14) that the decision below conflicts with Tenth Circuit decisions on the proof of intent required for conviction under Section 841(c)(2), but it is not clear that any substantive difference exists.

In *United States* v. *Saffo*, 227 F.3d 1260, 1268-1269 (2000), cert. denied, 532 U.S. 974 (2001), the Tenth Circuit held that a defendant may be convicted under Section 841(c)(2) if he had "reasonable cause to believe" that the listed chemical would be used to manufacture a controlled substance, and it rejected the argument that such a *mens rea* requirement is constitutionally insufficient. The court in *Saffo* stated that the statute's *mens rea* requirement looks to "whether the particular defendant accused of the crime knew or had reasonable cause to believe the listed chemical would be used to manufacture a controlled substance"—a standard that "requires scienter to be evaluated through the lens of this particular defendant, rather than from the p[er]spective of a hypothetical reasonable man." *Id.* at 1268-1269; accord *United States* v. *Muessig*, 427 F.3d 856, 862 (10th Cir. 2005) (upholding conviction where "[a] reasonable jury could infer from [the defendant's] conduct and admissions that she had reasonable cause to believe the pseudoephedrine would be used to make controlled substances"). That position is consistent with the standard approved by the court below, which cited *Saffo* with approval and stated that "reasonable cause to believe is not purely objective, but turns on *the facts actually known by the defendant* in a particular case—facts from which the jury can infer that any reasonable person in the defendant's position would have had to know that the ingredients were being bought to make illegal drugs." Pet. App. 8.

Petitioner argues (Pet. 12, 14) that the decision in this case conflicts with the Tenth Circuit's later decision in *United States* v. *Truong*, 425 F.3d 1282 (2005). *Truong* did not address a challenge to jury instructions, as in this case, but instead addressed a claim that the evidence was insufficient to prove that the defendant violated Section 841(c)(2). The Tenth Circuit in *Truong* stated that the Ninth Circuit had adopted an "objective" standard, under which the government need only prove "that a reasonable person in the defendant's circumstances should have known * * * that the substance would be used to manufacture methamphetamine," and the court appeared to draw a contrast between that standard and its own, more "subjective" standard. 425 F.3d at 1289. As the decision in the instant case makes clear, however, the Ninth Circuit has not adopted an entirely objective standard. Instead, the Ninth Circuit requires proof that the defendant *subjectively* knew facts that either caused him or would cause a reasonable person to believe that the ingredients are being used to produce illegal drugs. Pet. App. 8. That standard is quite similar to the Tenth Circuit's standard in *Saffo* and in *Truong* itself.[5] The Tenth Circuit's comment that the "reasonable cause to believe" standard under Section 841(c)(2) is "akin to actual knowledge," *Truong*, 425 F.3d at 1289 (quoting *Saffo*, 227 F.3d at 1269), is also

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[5] See *Truong*, 425 F.3d at 1289 (noting that it is not sufficient "for the government to prove that the defendant was negligent or reckless with respect to the risk that the [listed chemical] would be used to manufacture methamphetamine," but that it would be sufficient for the government to prove that "the defendant was aware, *or had reasonable cause to believe*, that the substance would be used for the specific purpose of manufacturing methamphetamine") (emphasis added). Accord *Muessig*, 427 F.3d at 861-862.

consistent with the position adopted by the court of appeals in this case, which noted that, "[a]s a practical matter," the "differences between actual and constructive 'knowledge' under the statute are not substantial." Pet. App. 8.

3. Petitioner also contends (Pet. 25-27) that the government must prove as an element of the Section 841(c)(2) offense that the pseudoephedrine pills he sold were actually used to manufacture methamphetamine unlawfully. According to petitioner, since the pseudoephedrine pills he sold to informants and a law enforcement officer in the "sting" investigation were not in fact used to unlawfully make methamphetamine, his convictions must be reversed. The court of appeals correctly rejected that claim.

As the court of appeals explained, the Section 841(c)(2) offense is committed at the moment a defendant possesses or distributes a listed ingredient while knowing or having reasonable cause to believe the chemical will be used to unlawfully make drugs. Pet. App. 10. Accordingly, "a defendant violates the statute based on his understanding that he or she is contributing to the production of illicit drugs, even if the drugs ultimately are not made." *Ibid.*

That understanding is consistent with the ordinary meaning of the terms involved. Section 841(c)(2) does not contain two independent requirements—the existence of a reasonable cause to believe that the listed chemical will be used to manufacture a controlled substance *and* actual use of the chemical to do so. Rather, Section 841(c)(2) contains the single requirement that the defendant have reasonable cause to believe that the listed chemical will be so used. Just as, for example, a person may have a reasonable cause to believe that her

husband will be going to the supermarket if various facts (such as the husband's statement, the time of day, his possession of a grocery list, etc.) indicate that destination, a defendant may have a reasonable cause to believe that a listed chemical will be used to manufacture methamphetamine based on various circumstances known to the defendant. The fact that the spouse does not in fact go to the supermarket, or that the listed chemical is not in fact used to manufacture a controlled substance, does not negate the conclusion that there was reasonable cause to believe that those events would occur.

The only appellate courts that have addressed the issue have agreed with the court below that the language of Section 841(c)(2) does not require proof that controlled substances were actually manufactured from chemicals possessed or sold by a defendant. See *United States* v. *Prather*, 205 F.3d 1265, 1269 (11th Cir.) (plain language of the statute indicates that "Congress did not intend to require proof that the controlled substance had actually been manufactured"), cert. denied, 531 U.S. 879 (2000); *United States* v. *Benbrook*, 40 F.3d 88, 94 (5th Cir. 1994) ("statute does not require the possessor to be either in the process of manufacturing the drug or presently able to do so to be guilty of this charge"); *Green*, 779 F.2d at 1319 (proof of the actual manufacture of drugs using the prohibited chemical is not necessary).

There is no conflict among the circuits on this issue. While petitioner cites (Pet. 26) decisions from the Fifth Circuit and the Seventh Circuit to support his claim that a conflict exists—see *United States* v. *Plyman*, 551 F.2d 965 (5th Cir. 1977), and *United States* v. *Kraase*, 484 F.2d 549 (7th Cir. 1973)—those cases construed a firearms statute containing language different from the

drug statute at issue here.[6] As the Seventh Circuit itself explained in *Green*, the firearms statute is only "superficially similar" to Section 841(c)(2), in that the firearms statute requires knowledge of or reasonable cause to believe an existing "fact" (the residency of the potential firearm purchaser) that can be verified at the time of the sale of the firearm, while Section 841(c)(2) requires knowledge or reasonable cause to believe that a future event (the use of the listed chemical to manufacture a controlled substance) will occur. *Green*, 779 F.2d at 1319. Indeed, in cases specifically addressing Section 841(c)(2), the Fifth Circuit and the Seventh Circuit, consistent with the court of appeals in this case, have directly rejected claims that the government must prove actual manufacture of controlled substances. See *Benbrook*, 40 F.3d at 94 (5th Cir.); *Green*, 779 F.2d at 1319 (7th Cir.).

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[6] *Krause* and *Plyman* involved the interpretation of language in a firearms statute barring licensees from making certain gun sales knowing, or having reasonable cause to believe, the sale was to an out-of-state resident. Based on an assessment of the legislative history and intent underlying the firearms statute, *Krause* and *Plyman* held that it did not apply where the purchase was actually made to an in-state resident, regardless of the defendant's belief to the contrary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2006

(3)

No. 05-1018

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In The

Supreme Court of the United States

JOGA SINGH JOHAL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The Ninth Circuit
United States Court Of Appeals

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

I. THE GOVERNMENT ARGUES THAT THIS APPEAL IS NOT RIPE UNTIL RESENTENCING OCCURS, BUT THAT HAS ALREADY HAPPENED.

The government raises one issue in its brief in opposition that was not addressed in the petition; that is the question of whether this case is ripe for review. The government asserts that the judgment is not final because although the conviction was affirmed, the case was remanded for resentencing pursuant to *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005) (en banc).

We disagree that a remand for reconsideration of sentence places this case in an interlocutory posture. There is nothing further for the lower courts to decide with respect to the conviction, since that has already been affirmed; thus the policy of waiting for a final decision on the issue presented before granting review, *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring), is fully satisfied by prompt consideration of this petition. This Court has therefore granted review in this situation – where the federal issue concerning the validity of the conviction is final, even though there is a remand for resentencing – in the past. In fact, that was the precise situation in *Brady v. Maryland*, 373 U.S. 83, 85 n.1 (1963). In *Brady*, this Court granted the petition for writ of certiorari where the state's highest court had denied a petition for collateral relief from the conviction but had remanded for resentencing. This Court reviewed the question of law that was relevant only to the conviction.

It is not even clear that the petitioner could raise his current challenge to the conviction following resentencing. The government has argued in other cases that challenges to the conviction must be raised immediately in the first appeal, and are not timely when raised after resentencing instead, because the remand for resentencing begins an entirely new proceeding that results in another final order. *See, e.g., United States v. Pultrone*, 241 F.3d 306, 307-08 (3rd Cir. 2001) (citing 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3901, at 1 (Supp. 1990)).

In any case, the government omitted a critical fact: resentencing has already occurred. A copy of the district court's order declining to reopen its prior sentencing decision is attached as App. 1-2.

II. CONCLUSION

For all the foregoing reasons, Petitioner Joga Singh Johal respectfully requests that this Court grant his Petition for Writ of Certiorari and review the judgment of the court of appeals.

DATED: April 20, 2006

Respectfully submitted,

SHERYL GORDON MCCLOUD
Attorney for Petitioner
Joga Singh Johal

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, v. JOGA SINGH JOHAL, Defendant.	No. CR-02-214-FVS ORDER **ACTION REQUIRED BY UNITED STATES MARSHALS SERVICE** (Filed Apr. 10, 2006)

THIS MATTER comes before the Court pursuant to *United States v. Ameline,* 409 F.3d 1073 (9th Cir. 2005). Joga Johal is represented by Frank L. Cikutovich; the government by Joseph H. Harrington.

BACKGROUND

On August 6, 2003, a jury found Joga Johal guilty of three counts of distribution of pseudoephedrine. 21 U.S.C. § 841(c)(2). Under the Sentencing Guidelines, Mr. Johal faced a range of 151-188 months in prison. He appeared for sentencing on December 12, 2003. The Court departed downward and sentenced him to a term of 70 months imprisonment. Moreover, the Court allowed him to remain out of custody while he appealed. The Ninth Circuit affirmed his conviction, but remanded his case for further proceedings consistent with *United States v. Ameline,* 409 F.3d 1073 (9th Cir. 2005). After mandate was received, the Court invited the parties to submit supplemental memoranda. They have done so.

RULING

At the time the Court sentenced Mr. Johal, the Court was convinced his case fell outside the "heartland" of § 841(c)(2) cases. Consequently, the Court departed downward and imposed a sentence which was 81 months below the bottom end of the Guideline range. Now that Mr. Johal's case has been remanded by the Ninth Circuit, the Court has carefully reviewed the record, including the materials submitted by the parties since remand. Having done so, the Court is satisfied it would not have imposed a materially different sentence on December 12, 2003, had the Court known the Sentencing Guidelines were advisory.

IT IS HEREBY ORDERED:

1. The Court declines to resentence Mr. Johal.

2. The United States Marshals Service shall furnish a copy of the judgment to the Bureau of Prisons so the Bureau can designate the facility at which Mr. Johal will serve his sentence.

3. Mr. Johal shall report to the facility designated by the Bureau of Prisons on the date and at the time specified by the Bureau.

IT IS SO ORDERED. The District Court Executive is hereby directed to enter this order and furnish copies to counsel, to the United States Marshals Service, and to the United States Probation Office.

DATED this 10th day of April, 2006.

s/ Fred Van Sickle
Fred Van Sickle
United States District Judge